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 Case No. CV 15-02194 PSG

UNITED STATES DISTRICT COURT  
 NORTHERN DISTRICT OF CALIFORNIA  
 SAN JOSE DIVISION

SECURITIES AND EXCHANGE	)	Case No. CV 12-3237 EJD
COMMISSION,	)	
	)	
Plaintiff,	)	DEFENDANT'S ADMINISTRATIVE MOTION
	)	TO CONSIDER WHETHER CASES SHOULD BE
	)	RELATED
v.	)	
	)	
SMALL BUSINESS CAPITAL CORP.;	)	
MARK FEATHERS; INVESTORS PRIME	)	
FUND, LLC; and SBC PORTFOLIO FUND,	)	
LLC,	)	
	)	
Defendants.	)	

MARK FEATHERS, INDIVIDUALLY AND	)	Case No. CV 15-02194 PSG
ON BEHALF OF ALL THOSE PERSONS	)	
AND ENTITIES SIMILARLY SITUATED,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
	)	
Defendant.	)	

DEFENDANT'S ADMINISTRATIVE MOTION TO CONSIDER WHETHER CASES SHOULD BE RELATED  
 Case Nos. CV 12-3237 EJD and CV 15-02194 PSG

PLEASE TAKE NOTICE that, pursuant to Civil L. R. 3-12 and Civil L. R. 7-11, Defendant United States of America moves the Court for an order finding that the two above-referenced cases are related for the reasons described below.

Summary of Case No. CV 12-3237 EJD

On June 21, 2012, the Securities and Exchange Commission (“SEC”) filed its Complaint in *Securities and Exchange Commission v. Small Business Capital Corporation* (“SEC v. SBCC”). Case No. 12-CV-03237 EJD (N.D. Cal), Dkt. No. 1. The SEC alleged that defendant Mark Feathers orchestrated a \$42 million offering fraud through three entities, also defendants, that he controlled: Small Business Capital Corporation (“SBCC”), which Feathers owns, and two mortgage funds SBCC manages, Investors Prime Fund, LLC (“IPF”), and SBC Portfolio Fund, LLC (“SPF”) (collectively, the “Funds”). *Id.* The Complaint alleged that, since at least 2009, the defendants had violated antifraud provisions of the Securities Act and the Exchange Act by representing that the Funds would pay investors returns from profits from the Funds’ mortgage portfolios, that the Funds would use 96% to 98% of offering proceeds to make or invest in mortgages, that the Funds had conservative lending standards and for the most part were prohibited from making loans to SBCC, and that the Funds’ loan portfolios were performing well with all loans current and secured. *Id.*

The Complaint further alleged that from 2009 through early 2012, Feathers and SBCC caused the Funds to make unsecured loans totaling \$6 million to SBCC, which SBCC used to pay its operating expenses. *Id.* Feathers and SBCC failed to disclose that they caused the Funds to continue to advance money to SBCC and that SBCC was able to make interest payments to the Funds only by borrowing more money from IPF. *Id.* Feathers and SBCC also failed to disclose that the Funds were unable to assess the collectability of the unsecured receivables due from SBCC because of the uncertainty of SBCC’s cash flow. *Id.* The Complaint also alleged that Feathers and SBCC owed a fiduciary duty to the Funds’ investors and failed to disclose the significant conflicts of interest arising from their \$6 million in unsecured borrowings from the Funds to pay SBCC’s operating expenses, as well as from sales of mortgages between the Funds that were made at substantial premiums in order to create “profits” that were then used to pay unjustified management fees to SBCC. *Id.*

DEFENDANT’S ADMINISTRATIVE MOTION TO CONSIDER WHETHER CASES SHOULD BE RELATED  
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When the SEC filed its Complaint, the SEC simultaneously sought emergency relief in the form of a Temporary Restraining Order and orders freezing assets, prohibiting the destruction of documents, granting expedited discovery, requiring accountings, and appointing a temporary receiver. *Id.*, Dkt. Nos. 1 & 5. The SEC's *ex parte* motion was supported, in part, by a declaration from SEC accountant Roger Boudreau. *Id.*, Dkt. No. 8. On June 26, 2012, the Court entered the Temporary Restraining Order and related orders freezing assets, prohibiting the destruction of documents, granting expedited discovery, requiring accountings, and appointing Thomas Seaman as temporary receiver of SBCC, IPF, and SPF. *Id.*, Dkt. No. 16. The Court also issued an Order to Show Cause regarding the entry of a preliminary injunction and appointment of a permanent receiver. *Id.*

On July 3, 2012, Feathers consented and stipulated to entry of a preliminary injunction and appointment of a permanent receiver. *Id.*, Dkt. No. 29. Feathers was *pro se*, but he was advised by "counsel, of limited engagement, Mark Fickes, Esq., Braun Hagel & Borden." *Id.* at 3. On July 10, 2012, the Court issued a preliminary injunction and related orders, and appointed Thomas Seaman as permanent receiver. *Id.*, Dkt. No. 34.

Beginning on November 5, 2012, Feathers filed a number of motions challenging all aspects of the SEC's action. *See, e.g., id.*, Dkt. Nos. 92, 93, 94, 96, & 126. In a motion seeking dismissal for cause and special sanctions against Boudreau, Feathers argued that Boudreau made "false statements and representations" to the Court in his declaration in support of the temporary restraining order, which "was part of an unlawful general seizure" of SBCC. *Id.*, Dkt. No. 126, at 1. Feathers argued that Boudreau had created "his own tables of false illustrations," and that "[i]n lay terms, Boudreau has deliberately, fraudulently, and incorrectly" calculated certain numbers to support the claim that Feathers and SBCC had made Ponzi-like payments to investors. *Id.* at 3.

In its opposition to Feathers's motion to dismiss, the SEC did not dispute that in calculating member returns, Boudreau had added together the line items "distributions" and "re-invested distributions" to arrive at total distributions. *Id.*, Dkt. No. 160. However, the SEC pointed out that:

Feathers raises factual disputes with certain discrete allegations in the Complaint, specifically the amount of member returns paid to investors as alleged in a chart following paragraph 54 of the Complaint. However, even using Feathers' amounts for the

1 member returns, the facts continue to show that, based on defendants' financial  
2 statements, defendants made Ponzi-like payments to investors in 2011 and Q1 2012. For  
3 example, Feathers states that IPF's income was \$1,366,615.00 in 2011, and that IPF made  
member distributions of \$1,390,853.02. Thus, defendant's own figures show that  
defendants caused IPF to make distributions in excess of its net income.

4 *Id.* at 5-6 (note omitted). Thus, the substance of the allegations supported by Boudreau's declaration—  
5 that Feathers caused the Funds to make Ponzi-like payments in excess of net income—was not in  
6 dispute.

7 On February 22, 2012, The Court denied Feathers's motion to dismiss and motion for sanctions.  
8 *Id.*, Dkt. No. 272. Later that day, Feathers filed additional motions seeking dismissal and sanctions. *Id.*,  
9 Dkt. Nos. 273 & 274. In those motions, Feathers again complained that a formula used by the SEC  
10 "was very defective, has caused to be illustrated in the complaint vastly overstated IPF and SPF  
11 distributions, which are improper and unreliable" and that the "formula used by Plaintiff was the work  
12 of Roger Boudreau, a licensed public accountant." *Id.*, Dkt. No. 273, at 3. On May 10, 2013, the Court  
13 held a hearing regarding this and other motions before issuing an order denying all of Feathers's  
14 motions. *Id.*, Dkt. Nos. 454 & 456.

15 On April 2, 2013, with leave of Court, Feathers filed a motion requesting an award of legal  
16 expenses. *Id.*, Dkt. No. 329. In that motion, Feathers again raised the issue of a "false formula" used by  
17 Boudreau. *Id.* The Court found that Feathers had provided no basis for disturbing its prior order  
18 denying an award of legal expenses, and the motion was denied. *Id.*, Dkt. No. 457.

19 On May 13, 2013, Feathers filed a motion for summary judgment. *Id.*, Dkt. No. 459. On May  
20 23, 2013, the SEC filed its own motion for summary judgment. *Id.*, Dkt. No. 477.

21 On August 16, 2013, the Court issued an order granting the SEC's motion and denying  
22 Feathers's motion. *SEC v. SBCC*, No. 12-CV-03237 EJD, 2013 WL 4455850 (N.D. Cal.), Dkt. No. 591.  
23 The Court found that the SEC had "shown that Feathers was not using Fund profits to pay out returns,  
24 but rather other member investments—contrary to the representations of the Funds' offering  
25 documents—as 'Ponzi-like payments.'" *Id.* at \*8.

1 The SEC subsequently filed motion for injunction and remedies, and the Court entered an order  
 2 permanently enjoining Feathers from violations of the antifraud and broker-dealer registration  
 3 provisions of the federal securities laws, as well as requiring Feathers to disgorge \$7,782,961.07 and pay  
 4 a \$10,000 civil penalty. *Id.*, Dkt. Nos. 602 & 622.

5 Feathers appealed the Court's orders granting summary judgment and imposing remedies. *Id.*,  
 6 Dkt. Nos. 593 & 623. In his brief for the appeal of the latter order, Feathers argues that the SEC's  
 7 complaint employed the following "corrupt and hidden formula": "FUND DISTRIBUTIONS = FUND  
 8 DISTRIBUTIONS PLUS FUND MEMBER REINVESTMENTS." *Feathers v. SEC*, Case No. 13-17304 (9th Cir.),  
 9 Dkt. No. 3, at 14. The appeal is still pending.

#### 10 Summary of Case No. CV 15-02194 PSG

11 On May 15, 2015, Feathers brought a civil action against the United States on behalf of himself  
 12 and a putative class of approximately three hundred individuals who invested in the Funds. *Feathers v.*  
 13 *United States*, Case No. 15-CV-02194 PSG (N.D. Cal.), Dkt. No. 1, at 1. Feathers brings suit under the  
 14 Federal Tort Claims Act ("FTCA") for Boudreau's alleged professional negligence, the SEC's alleged  
 15 negligence, "failure to disclose, or, alternatively, to intercede," the SEC's supervisory liability, false  
 16 light, and negligent infliction of emotional distress. *See id.*, Dkt. No. 1, at 21-27. Feathers also brings  
 17 suit under 42 U.S.C. § 1983 for alleged violation of his civil rights. *Id.*, Dkt. No. 1, at 23-24. Finally,  
 18 Feathers brings suit under the Privacy Act for the SEC's alleged failure to make reasonable efforts to  
 19 assure records are accurate, complete, and relevant. *Id.*, Dkt. No. 1, at 26-27. As in *SEC v. SBCC*,  
 20 Feathers again asks the Court for an award of legal expenses to be paid from the Funds so that he may  
 21 pursue his legal claims. *Id.*, Dkt. No. 1, at 29.

22 Feathers is seeking to recover losses that he alleges were incurred as a result of early filings in  
 23 *SEC v. SBCC*, in which the SEC submitted documents based on an alleged miscalculation of the Funds'  
 24 distributions. *See, e.g., id.*, Dkt. No. 1, at 6, ¶ 3 ("Boudreau, a licensed CPA, acted in professional  
 25 negligence by adding member's 'distributions' together with their 'investments', and calling these all,  
 26 again, 'distributions'."); Dkt. No. 1, at 8, ¶ 19 ("SEC relied upon Boudreau's negligent work product to  
 27

bring its civil action against Plaintiffs.”); Dkt. No. 1, at 9, ¶ 23 (“Boudreau’s negligence was the cause of substantial harm to [Feathers] and others similarly situated . . .”).

Specifically, Feathers alleges that he and the Funds suffered when their assets were frozen “on the basis of SEC’s pleadings which contained scores of Boudreau’s objectively false financial illustrations.” *Id.*, Dkt. No. 1, at 9, ¶ 25. Feathers also alleges that he suffered harm to his reputation “due to SEC labeling him running a ‘Ponzi scheme’ in their civil lawsuit pleadings.” *Id.*, Dkt. No. 1, at 9, ¶ 35. Feathers claims that “[i]f Plaintiff’s assets and income had not been seized from them, they could have employed a CPA, who would have quickly determined Boudreau’s work to be negligent and void of accuracy. That would have provided a basis for dismissal of the injunction early into the lawsuit.” *Id.*, Dkt. No. 1, at 16, ¶ 75.

In Case No. CV 12-3237 EJD, plaintiff filed a request for leave to file a motion to have Judge Davila consider modifying the permanent injunction to allow for legal fees and expert witness fees in Case No. CV 15-02194 PSG. Case No. CV 15-02194 PSG, Dkt. No. 15 (request for judicial notice).

Contemporaneous with the filing of this Administrative Motion, Defendant filed a Motion to Dismiss in Case No. CV 15-02194 PSJ, which is scheduled for hearing on September 8, 2015, on Magistrate Judge Grewal’s calendar. If this Administrative Motion is granted, Defendant will re-notice that motion on Judge Davila’s calendar. If this Administrative motion is denied, and the cases are found to be unrelated, then Defendant will file a Consent to Proceed before a Magistrate Judge (as plaintiff did) so that the filed Motion to Dismiss can proceed as scheduled.

#### Administrative Relief Requested

Based on the summaries set forth above, within the meaning of Civil L.R. 3-12, the two above-referenced cases are related because they both involve the same or similar parties, witnesses, and factual events. In both cases, Feathers contends that the government’s accountant relied on a flawed formula. As Judge Davila has already repeatedly rejected this argument, it appears likely that there will be an unduly burdensome duplication of labor and expense and the possibility of conflicting results if the later filed case is handled by Magistrate Judge Grewal.

Feathers is also a defendant in a criminal case (Case No. CV 14-00531 RMW) filed by the government stemming from the same facts that are the subject of Case No. CV 12-3237 EJD. Defendant acknowledges that Judge Davila determined that the criminal case was not related to the *SEC v. SBCC* action. Clerk's Notice, Case No. CV 12-3237 EJD, Dkt. No. 987 filed December 11, 2014. Defendant submits that Case Nos. CV 12-3237 EJD and CV 15-02194 PSG are more closely related than Case Nos. CV 12-3237 EJD and CV 14-00531 RMW. Case Nos. CV 12-3237 EJD and CV 15-02194 PSG are both civil cases, and Feathers seeks monetary damages in the latter for the government's allegedly wrongful conduct in the former. It does not seem to be an efficient use of resources for three separate federal judicial officers to be involved in this saga.

Accordingly, Defendant United States requests that these two cases be found to be related and that the later-filed case, Case No CV 15-02194, be reassigned to Judge Davila for future handling. Judge Davila is well familiar with Feathers and his criticism of the government's accountant's work in the earlier-filed *SEC v. SBCC* action.

Dated: July 28, 2015

Respectfully submitted,

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United States Attorney

/S/  
James A. Scharf  
Assistant United States Attorney  
Attorneys for Defendant United States of America

#### [PROPOSED] ORDER

An Administrative Motion to Consider Whether Cases Should Be Related has been filed stating that the following cases are related within the meaning of Civil L.R. 3-12: Case Nos. CV 12-3237 EJD and CV 15-02194 PSG.

On the basis of the material submitted to the Court and the Court's own files, as the Judge assigned to the earliest filed case, I find that these two cases ARE RELATED as defined by Civil L.R. 3-12. Accordingly, the Clerk of Court is ordered to reassign the later-filed action to the undersigned. The parties are instructed that all future filings are to bear the initials EJD immediately after the case number.

DEFENDANT'S ADMINISTRATIVE MOTION TO CONSIDER WHETHER CASES SHOULD BE RELATED  
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1 All case management dates and events presently scheduled in the reassigned case are vacated.

2 Defendant shall re-notice its Motion to Dismiss on this Court's calendar.

3 Good cause appearing, it is so ordered.

4 DATED:

5  
6 Hon. Edward J. Davila  
United States District Court Judge